COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2013-SC-000828-TG

HONORABLE ANN BAILEY SMITH,
JUDGE, JEFFERSON DISTRICT COURT — **APPELLANT**

vs.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. McDONALD-BURKMAN
NO. 2013-CI-003689

COMMONWEALTH OF KENTUCKY, *ex rel.*
MICHAEL J. O'CONNELL, *et al* — **APPELLEES**

BRIEF FOR THE APPELLEES

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CERTIFICATE OF SERIVCE

I hereby certify that a copy of the foregoing *Brief for the Appellees* was mailed by U.S. First Class mail, postage prepaid to: Samuel P. Givens, Jr., Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; Honorable Judith McDonald-Burkman, Judicial Center, 700 W. Jefferson St., 8th Floor, Louisville, Kentucky 40202; Virginia Hamilton Snell, Deborah H. Patterson and Sara Veeneman, Wyatt, Tarrant & Combs, LLP, 2800 PNC Plaza, 500 W. Jefferson Street, Louisville, Kentucky 40202 on this the eighteenth (18th) day of August, 2014.

David A. Sexton
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INTRODUCTION

This case is an appeal by a single Judge of the Jefferson District Court from an *Order* of the Jefferson Circuit Court which prohibited her from imposing court costs on citizens who resolve minor traffic citations prior to adjudication pursuant to a county attorney traffic safety program authorized by KRS 186.574(6).

STATEMENT CONCERNING ORAL ARGUMENT

Appellees respectfully request oral argument since more than half of Kentucky's county attorneys operate a traffic safety program to permit citizens to resolve minor traffic offenses prior to adjudication as authorized by KRS 186.574(6).

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

A. Prefatory Statement.

Before setting out its Counterstatement of the Case in this brief, the Appellees are compelled to first address a recurring factual representation which appears not once, but at least five times, through the Appellant's brief on the merits. The representation made by the Appellant warrants separate treatment as it inaccurately asserts that the Commonwealth's representative in the Jefferson District Court, the Jefferson County Attorney, contended that he alone had the authority to dismiss the traffic citation against the Appellee Timothy J. Higgins and other similarly situated citizens who successfully complete a county attorney traffic safety program.

The Appellant asserts on page 2 of her brief that the Jefferson County Attorney appeared in the Jefferson District Court and boldly claimed that "he alone has the power to dismiss the traffic charge against Appellee Timothy Higgins,...." (*Brief for Appellant*, p. 2). The Appellant revisits that claim once more at page 16 of her brief and alleges that it was the Jefferson County Attorney's "argument that he has the power to dismiss cases unilaterally without court involvement." (*Brief for Appellant*, p. 16). Four pages later, the Appellant continues her attack contending that the Jefferson County Attorney adopted nothing less than an "indignant affront to any judicial involvement in the ultimate resolution of traffic violations in cases that appear on the court's docket." (*Brief for Appellant*, p. 20). Her final two claims were that the Jefferson County Attorney advanced a "self proclaimed authority to unilaterally dismiss cases without court involvement", (*Brief for Appellant*, p. 26), and that he had claimed in the proceedings in the Jefferson District Court that he alone could "unilaterally dismiss a case." (*Brief for Appellant*, p. 26 fn. 9).

Of course, the Jefferson County Attorney never made the assertion that somehow he alone could exercise judicial authority and order the dismissal of the minor traffic citation against Mr. Higgins or any other citizen charged with a traffic offense. The Appellant has tendered with her brief on the merits a voluminous Appendix of materials. However, in that voluminous Appendix the Appellant conveniently neglected to include a copy of the Commonwealth's *Motion to Dismiss Uniform Citation* which was filed on June 4, 2013 during the pendency of the proceedings involving Appellee Higgins in the Jefferson District Court. (Appendix, pp.5-21). In its *Motion to Dismiss Uniform Citation*, the Commonwealth expressly set out that it "moves this Honorable Court to dismiss the *Uniform Citation* in the above styled case, with prejudice,... ." (Appendix, p.5). The Jefferson County Attorney, on behalf of the Commonwealth, explained that "the Commonwealth now seeks an order of this court to dismiss the Uniform Citation, with prejudice... ." (Appendix, p. 6). The Commonwealth wrote that it "moves this Court to dismiss the Uniform Citation in this case, with prejudice."... and acknowledged that "the authority to dismiss pending prosecution in this Commonwealth is set out in RCr 9.64." (Appendix, p. 6).

In light of this court's decision in Hoskins v. Miracle, 150 S.W.3d 1, 24 (Ky. 2004), setting out the controlling standard for the dismissal of cases pursuant to RCr 9.64, the Commonwealth explained that "the prosecutor in this case, the Jefferson County Attorney, is entitled to exercise his discretion to seek the determination of this case and other traffic cases like it"... and that "this Court is without authority to disturb the exercise of the executive branch's prosecutorial discretion unless discretion has been exercised in a manner which is nothing short of 'clearly contrary to manifest public interest'." (Appendix, p. 8). In short, the record reflects that the Jefferson County Attorney fully recognized the judicial authority of the Jefferson District Court and properly sought a judicial order of dismissal of the traffic case

against Appellee Higgins based upon the authority of RCr 9.64. The Appellant's claim that somehow the Jefferson County Attorney repeatedly expressed nothing less than a "indignant affront" to judicial involvement in the dismissal of the *Uniform Citation* is flatly refuted by the record.

B. The 2012 Legislation

The General Assembly passed House Bill 480 during its 2012 Regular Session to amend KRS 186.574. House Bill 480 created a new subsection 6 of KRS 186.574 and authorized county attorneys in Kentucky to operate a traffic safety program "prior to the adjudication of the offense." KRS 186.574(6)(a). Subsections 1 through 5 of KRS 186.574 concern the state traffic school operated by the Kentucky Transportation Cabinet. KRS 186.574(1) provides that "District Courts may…sentence offenders to state traffic school… ." The statute provides that a District Court may stipulate "in its judgment of conviction that a person attend state traffic school... ." KRS 186.574(2). Additionally, other provisions recite that persons required to attend the state traffic school program shall be "sentenced to attend state traffic school." *See*, KRS 186.574(5)(a),(e).

In contrast to the provisions of KRS 186.574(1) through (5) wherein a traffic offender is **sentenced** to attend state traffic school, the General Assembly established county attorney traffic safety programs in House Bill 480 for traffic offenders "**prior to the adjudication of the offense.**" KRS 186.574(6)(a). Finally, since the Appellant mentions attempted 2014 legislation regarding KRS 186.574(6), it bears repeating that courts can not "speculate as to the legislature's collective intent, if it even had a collective intent in failing to pass a bill" … and that any proposed amendment may have failed "because they believed the current statutes were broad

enough without further clarification... ." Appalachian Racing LLC, *et al* v. Family Trust Foundation, *et al*, 423 S.W.3d 726, 736 (Ky. 2014).

That it was understood in the legislative process that court costs would not be imposed upon citizens who successfully complete a county attorney traffic safety program is reflected in testimony before the House Judiciary Committee heard on March 12, 2012. The then president of the District Judges Association was one of several persons who testified before the Committee, (Appendix, p. 33), and informed the members of the House Judiciary Committee considering House Bill 480 that "I do want to point out to the Committee that if you dismiss the citation rather than someone electing to go to state traffic school, the state general fund loses the court costs revenue." *See,* http://www.ket.org/legislative/archives.php?session=wgaos+13 (last visited June 3, 2013).

State Representative Robert Damron, one of House Bill 480's co-sponsors, explained that it was the intent of the legislature in enacting House Bill 480 "that citizens be provided an opportunity to resolve traffic citations through an appropriate educational process overseen by county attorneys so they could avoid fines, **the imposition of court costs** and the potential of higher insurance premiums [emphasis added]." (Appendix, p. 23). Representative Damron has gone on to say that "it was always our intent and understanding that **court costs would not be imposed** upon citizens who successfully completed a county attorney traffic safety program since the citations would be resolved and dismissed prior to any conviction and resulting sentence [emphasis added]." *Id.* Additionally, Representative Damron explained that during the legislative process, "Senator Stivers proposed an amendment for a $25 fee to be paid to the court clerk that is now codified in KRS 186.574(d) which I supported for the benefit of our local court clerks. This is the **only** fee or cost that we intended to be imposed upon citizens in addition to

the reasonable fee that a county attorney can charge for participation in a traffic safety program [emphasis added]." *Id.*

Still later, Representative Damron pointed out that he was well aware of what the General Assembly intended with its passage of House Bill 480 as he was the co-sponsor of House Bill 480 in the Kentucky House of Representatives and managed the bill's passage in the House. (Appendix, p. 36-37). Representative Damron one again explained in no uncertain terms that "it was my own personal legislative intention, and that of the Kentucky General Assembly itself that court costs NOT be imposed on those successfully completing traffic safety programs under the terms of HB 480 as written and passed [emphasis original]." (Appendix, p. 36). The co-sponsor of the bill explained that "[t]he General Assembly understood and agreed that **there would be no imposition of court costs** for those who successfully completed a county attorney's program [emphasis added]." (Appendix, p. 36).

In 2013 the Jefferson County Attorney implemented a county attorney traffic safety program as authorized by KRS 186.574(6)(a)-(d), known as *Drive Safe Louisville,* so that relatively minor traffic offenses arising in Jefferson County could be resolved prior to adjudication. In doing so, the Jefferson County Attorney joined more than sixty other fellow county attorneys across the Commonwealth in both urban and rural areas who have implemented similar traffic safety programs in their respective counties. Nevertheless, the Appellant flatly refused to grant the Commonwealth's *Motion to Dismiss Uniform Citation* regarding the citation against Mr. Higgins which charged him with a minor traffic offense as well as similar minor traffic cases in which citizens have successfully completed *Drive Safe Louisville*. The Appellant has conditioned the exercise of her judicial authority to dismiss cases pursuant to RCr 9.64 on the requirement that citizens like Mr. Higgins be mandated to pay $134.00 in court costs **in**

addition to the fee paid to the county attorney and the $25.00 paid to the court clerk as authorized by the General Assembly in its passage of House Bill 480 and codified at KRS 186.574(6).

C. The Jefferson District Court Proceedings.

The underlying facts which gave rise to the case involving Mr. Higgins are relatively simple and do not appear to be in dispute. Mr. Higgins was cited for speeding in Jefferson County on March 1, 2013. (Appendix, p. 14). The Jefferson County Attorney's Office invited Mr. Higgins to participate in the Jefferson County Attorneys *Drive Safe Louisville* Program as authorized by KRS 186.574(6)(a)-(d). Mr. Higgins successfully completed the *Drive Safe Louisville* Program and paid the reasonable fee to the Jefferson County Attorney as authorized by KRS 186.574(6)(c)(1). (Appendix, p. 15). The only other fee authorized by House Bill 480 is a $25.00 fee paid to the court clerk. *See*, KRS 186.574(6)(d).

Since Mr. Higgins had done all that was required of him by the county attorney pursuant to the express statutory authority set out at KRS 186.574(6), the Commonwealth filed its previously discussed *Motion to Dismiss Uniform Citation* in the Jefferson District Court. (Appendix, pp.5-21). Thereafter, the Commonwealth filed its *Supplement To Its Previously Filed Motion To Dismiss The Uniform Citation* in follow up to a hearing conducted before the Jefferson District Court on June 10, 2013 on the Commonwealth's initial *Motion To Dismiss Uniform Citation*. (Appendix, pp. 24-31).

The Jefferson District Court issued its *Opinion and Order* on June 25, 2013 refusing to dismiss the *Uniform Citation* against Mr. Higgins. The Jefferson District Court concluded that it would dismiss the *Uniform Citation* against Mr. Higgins only upon the payment of $134.00 in court costs **in addition to** the payment of the monies expressly authorized by KRS 186.574(6).

(Appendix, p. 58). The Appellant stayed the payment of court costs if review of its ruling was sought by way of an original action or by way of an appeal. (Appendix, p. 58). An original action filed on behalf of the Commonwealth and Mr. Higgins in the Jefferson Circuit Court then followed.

D. The Jefferson Circuit Court Order.

On November 13, 2013 the Jefferson Circuit Court entered its *Order* granting the Appellees' *Petition for a Writ of Prohibition and/or Mandamus*. (Appendix, pp. 1-4). The Jefferson Circuit Court ultimately agreed with the Petitioners' argument that the "imposition of court costs on defendants that complete the DSL Program is contrary to KRS 24.175(3) and was not intended by the legislature when it adopted KRS 186.574(6)(a)-(d)." (Appendix, p. 1). The Jefferson Circuit Court explained that the imposition of court costs on citizens who successfully complete a county attorney traffic safety program is contrary to the express provisions of KRS 24A.175(3) which mandates the imposition of court costs in criminal cases in the District Court only "upon conviction in a case" and the express language of KRS 186.574(6) which authorizes county attorneys to operate traffic safety programs "prior to the adjudication of the offense." (Appendix, pp. 2-3). The Jefferson Circuit Court noted that "KRS 186.574(5)(a) specifically requires the payment of court costs for persons attending state traffic school. No similar language appears in subsection (6)." *Id.* Not surprisingly, the Jefferson Circuit Court concluded that the Appellant's "conditioning dismissal of Drive Safe Louisville participant's citations on the payment of court costs is erroneous." *Id.* The Appellant's direct appeal as a matter of right from that *Order* of the Jefferson Circuit Court now follows:

ARGUMENT

A. IMPOSITION OF COURT COSTS IS CONTRARY TO LAW.

1. Introduction.

The Appellant takes the remarkable position that court costs in the district court are "not reserved for convictions." (*Brief for Appellant*, p. 23). She recognizes that "court costs are mandatory upon conviction" but then goes on to insist that somehow "court costs may be imposed in other situations." *Id.* According to her, KRS 24A.175(1) stands for the proposition that "court costs apply in criminal cases." *Id.* Her assertion throughout her brief on the merits that somehow court costs in the district court are "not reserved for convictions" is simply contrary to the law of this Commonwealth governing the imposition of costs in criminal proceedings in the District Court. Given her assertions of the applicable statutory authority that "court costs are not reserved for convictions", (*Brief for Appellant*, p. 23), it would seemingly make no difference if a criminal case was dismissed or a defendant was ultimately acquitted since according to her court costs "apply in criminal cases" even in the absence of a conviction. Her strained reading of the applicable statutory authority regarding court costs would result in the imposition of court costs on those whose criminal cases are ultimately resolved in their favor. Since Appellant claims that court costs "apply in criminal cases", it is of no moment to her that sometimes such criminal cases do not end in a conviction – all that's required is that a defendant be named in a District Court proceeding for court costs to be imposed. Of course, the imposition of court costs in such instances is clearly contrary to the fundamental notions of fairness the Appellant professes to be so concerned about in her brief on the merits.

2. Court Costs Are Reserved For Convictions.

The imposition of court costs upon citizens like Mr. Higgins who successfully complete a county attorney traffic safety program is simply contrary to the controlling Kentucky law. The law of this Commonwealth does **not** authorize the imposition of court costs upon Mr. Higgins in his case or upon other citizens like him who successfully complete a county attorney traffic safety program. Of course, court costs for criminal cases in the District Court are governed by the provisions of KRS 24A.175. Subsection (1) of KRS 24A.175 provides that "[c]ourt costs for a criminal case in the District Court shall be one hundred dollars ($100), regardless of whether the offense is one for which prepayment is permitted." According to the Appellant, subsection (1) of KRS 24A.175 "makes clear that court costs apply in criminal cases." (*Brief for Appellee*, p. 23). Of course, the obvious flaw in the Appellees argument is that subsection (1) of KRS 24A.175merely establishes the **amount** of court costs in the District Court. Subsection 1 simply establishes how much, not **when** court costs are to be imposed.

In contrast, subsection (3) of KRS 24A.175 addresses the imposition of court costs in the District Court, or in the language of the statute, "[t]he taxation of court costs." KRS 24A.175(3) provides in relevant part that "[t]he taxation of court costs upon a defendant, **upon conviction in a case,** including persons sentenced to state traffic school as provided under KRS 186.574, shall be mandatory and shall not be subject to probation, suspension, proration, deduction or other forms of non imposition in the terms of a plea bargain or otherwise, ...[emphasis added]." The Appellees' reading of KRS 24A.175(3) as establishing the triggering event for the imposition of court costs on defendants is supported by the case law of this Commonwealth.

Throughout this litigation, the Appellees have relied upon the decisions of this Court in Travis v. Commonwealth, 327 S.W.2d 456 (Ky. 2010) and Brother v. Commonwealth, 381 S.W.3d 294 (Ky. 2012). The Appellant's brief on the merits is completely devoid of any mention of these two decisions by this Court, much less any attempt to distinguish them as somehow inapplicable to the facts and circumstances of this case. Those two decisions are simply no where to be found in Appellant's brief on the merits. As this Court explained in Travis, court costs are "part of the **sentence imposed** in a criminal case [emphasis added]." Travis v. Commonwealth, 327 S.W.2d 456, 459 (Ky. 2010). Further, as this Court explained two years later in Brother, the "determination of court costs is to be made **at the time of judgment** looking forward... [emphasis added]." Brother v. Commonwealth, 381 S.W.3d 294, 304 fn.6 (Ky. 2012).

Given the clear and unequivocal statements by this Court in Travis and Brother concerning court costs, perhaps it is not surprising that the Appellee conveniently neglected to even acknowledge their existence in her brief on the merits. The reasoning and rationale in Travis and Brother decisions are just as applicable to the facts and circumstances of this case since the statutory language in KRS 23A.205(2) – the statute authorizing the taxation of court costs in criminal cases in the Circuit Court, is **identical** to the statutory provision imposing court costs in criminal cases in the District Court – KRS 24A.175(3). Further, the General Assembly saw fit to make sure that persons sentenced to state traffic school be required to pay court costs as expressly provided for in 186.574(5)(a). Of course, any such requirement is conspicuously absent in KRS 186.574(6) for those citizens who resolve their traffic violation offense prior to adjudication through a county attorney traffic safety program.

Pursuant to the provisions of KRS 186.574(1) and (2), traffic offenders are **sentenced** to attend state traffic school as part of the sentence imposed in their traffic case in the District Court. KRS 186.574(1) provides, in relevant part, that "District Court may in lieu of assessing penalties for traffic offenses, other than for KRS 189A.010, **sentence offenders to state traffic school** and no other. [emphasis added]." Additionally, KRS 186.574(2) provides that "[i]f a District Court stipulates in its **judgment of conviction** that a person attends state traffic school, the court shall indicate this in the space provided on the abstract of conviction filed with the Transportation Cabinet [emphasis added]." Further, KRS 186.574(5)(a) provides that "the sentence to state traffic school shall be the person's penalty in lieu of any other penalty, except for the payment of court costs;... ." In short, persons are **sentenced** to state traffic school as part of their conviction and are required to pay court costs since the General Assembly has expressly provided that attendance at a state traffic school shall be the penalty in lieu of any other penalty except for the payment of court costs.

Out of an abundance of caution, the Jefferson County Attorney sought the counsel of the Attorney General of the Commonwealth on this issue. The Commonwealth readily acknowledges that the opinion of the Attorney General is not binding authority upon this court. Nevertheless, the reasoning and rationale as set forth by the Attorney General of this Commonwealth correctly and persuasively sets out why court costs are **not** authorized in this case and others like it. The Attorney General first noted that KRS 24A.175(3) provides that "taxation of court costs against the defendant, upon conviction in a case, including persons sentenced to state traffic school as provided under KRS 186.574, shall be mandatory." (Appendix, p. 17). The Attorney General then went on to note that "KRS 186.574(6)(a) provides that 'a county attorney may operate a traffic safety program for traffic offenders prior to the

adjudication of the offense.' " *Id.* As the Attorney General went on to observe "[a]ssuming the charges are dismissed before adjudication, the issue is whether this process is subject to the mandatory assessment of court costs in KRS 24A.175(3)." (Appendix, p. 18).

The Attorney General then went on to explain that the language regarding the imposition of court costs "upon conviction in a case" contained in KRS 23A.205(2) has been interpreted as meaning that " 'the decision to impose or waive court costs is to be made by the trial court by or at the time of sentencing.' Buster v. Commonwealth, 381 S.W.3d 294, 305 (Ky. 2012); Miller v. Commonwealth, 391 S.W.3d 857, 870 (Ky. 2013)." (Appendix, p.18). Since the relevant language in KRS 23A.205(2) and KRS 24A.175(3) is the same, the Attorney General explained that there is no reason to differentiate the meaning of the phrase "upon conviction in a case" between the two statutes. *Id.* As the Attorney General went on to observe, "if there is no sentencing then costs may not be imposed." *Id.* The Attorney General noted that the imposition of court costs is purely statutory in nature and that KRS 186.574(6)(d) provides only for the payment of a fee to the county attorney and to the court clerk. Accordingly, the specific requirements of KRS 186.574(6)(d) trumps the fees required by KRS 24A.175(3). (Appendix, p. 19). The Attorney General advised the Jefferson County Attorney "that since court costs may only be imposed at the time of sentencing, they may not be imposed on traffic offenders who complete a county attorney operated traffic safety program unless the offender is adjudicated and sentenced." *Id.* Further, during the proceedings in the Jefferson District Court the Jefferson County Attorney also pointed out that the General Counsel for the Administrative Office of the Courts had taken the same position regarding the imposition of court costs as it related to participants in a county attorney traffic safety program, (Appendix, p. 20), a legal position

entirely consistent with the contemporaneous legislative history **and** the conclusion of the Attorney General.

In addition to ignoring the plain language of KRS 24A.175(3) reserving the imposition of court costs for "conviction in a case", the Appellant relies upon the language contained in KRS 24A.175(1) concerning prepaid offenses. According to Appellant, "Prepayment" is necessarily "pre-adjudication" which somehow permits the imposition of court costs in situations other than a conviction in a case set out in KRS 24A.175(3). (*Brief for Appellant*, p. 3). Later in her brief, she once more suggests that the language in 24A.175(1) concerning prepayment somehow widens the net for the imposition of court costs upon citizens when she complains that the Jefferson Circuit Court did "not address KRS 24A.175(1) that provides for court costs "regardless if the offense is one for which prepayment is permitted." (*Brief for Appellant*, p. 15).

Once again, the Appellant simply ignores the law of this Commonwealth when she maintains that the imposition of court costs for prepayable offenses somehow permits to ignore the requirement of a conviction to impose court costs. The language in KRS 24A.175(3) regarding prepayable offenses provides no basis for concluding that a conviction is somehow not required as set out in KRS 24A.175(3). The Appellant simply ignores the express provisions of KRS 431.452. Specifically, KRS 431.452(3)(e) provides that "[p]repayment of the fine and costs shown on the citation or accompanying schedules shall be considered as a plea of guilty for all purposes." In short, when a citizen pays a prepayable offense it is an admission of guilt which results in a conviction for that offense. Upon conviction, costs are then properly imposed. That persons pay court costs when they prepay an offense is entirely consistent with the Appellee's position that the imposition of court costs is reserved for those cases in which a conviction for an offense is obtained. Try as she might, her resort to the law governing

prepayable offenses actually **supports** the conclusion reached by the Jefferson Circuit Court that costs could not be imposed in the absence of a conviction.

3. The Express Provisions of House Bill 480.

That the Appellant somehow deems it unwise or unfair not to impose court costs upon those who successfully complete a county attorney traffic safety program is no excuse to conveniently disregard the express provisions of House Bill 480. The General Assembly, in its 2012 enactment of House Bill 480, specifically authorized a fee "for payment of county attorney operating expenses", KRS 186.574(6)(c)(1), and a $25.00 fee to the court clerk. *See*, KRS 186.574(6)(d). Try as she might, the Appellant is not free to disregard the clear intention of the General Assembly as some sort of defender of the Commonwealth's General Fund. The General Assembly knew full well what it was doing and it is not for the Appellant to question the fiscal impact of House Bill 480 since "the wisdom or expediency of enactments of the legislature is not for the courts to pass upon. **This may be said to have special pertinency in matters of fiscal policy and authority to levy taxes and to appropriate the revenue** [emphasis added]." Dalton v. State Property and Building Commission, et al, 304 S.W.2d 342, 345 (Ky. 1957). The Appellant's claim that she somehow rightly defends the coffers of the Commonwealth is contrary to the fundamental principle that in matters of fiscal policy the judicial branch must defer to "the difficult judgments reached" by the Legislative Branch "as to the common good not according to the individual favor of Government agents or the individual pleas of litigants." Fletcher v. Commonwealth, 163 S.W.3d 852, 864 (Ky. 2005), *quoting* Office of Personnel Management v. Richmond, 496 U.S. 414, 427-28, 110 S.Ct. 2465, 2473, 110 L.Ed.2d 387 (1990).

The General Assembly has charged the courts of this Commonwealth to interpret its statutes with a liberal construction aimed toward maintaining their legislative intent: "all statutes...shall be liberally construed with a need to promote their objects and carry out the intent of the legislature..." *See*, KRS 446.080. "A statute should be construed, if possible, so as to effectuate the plain meaning and unambiguous attempt to express the law." Bob Hook Chevrolet Isuzu, Inc. v. Commonwealth of Kentucky, Transportation Cabinet, 983 S.W.2d 488, 492 (Ky. 1998). With these fundamental principles in mind, this court ought to reject the Appellant's continued assertion that the General Assembly somehow intended to impose court costs on those who successfully complete a county attorney traffic safety program prior to adjudication.

First, it must be remembered that there is not any kind of inherent common law authority for a court to impose court costs upon a defendant in a criminal case. "At common law a defendant in a criminal action was not liable for costs" and any liability for costs "is because of legislative enactments and not others." Frazier v. Toliver, 204 Ky. 79, 263 S.W.713 (1924). As noted earlier herein, KRS 186.574(6) expressly provides for the payment of a fee to the county attorney and a $25.00 fee to the court clerk. In its passage of House Bill 480 and its amendment of KRS 186.574 the General Assembly made clear that the only monies to be paid by a traffic offender who successfully completes a county attorney traffic safety program, in addition to the reasonable fee paid to the county attorney, is the $25.00 fee to the court clerk as specifically set out in KRS 186.574(6)(d). If the General Assembly had intended for citizens who successfully complete a county attorney traffic safety program to pay court costs, it could have easily said so. It could have expressly provided for the payment of court costs in Subsection (6) of KRS 186.574 or could have amended KRS 24A.175 to expressly provide for the payment of court costs as it has done for those who participate in the state traffic school program. However, it did

neither. In contrast, as already noted herein the General Assembly has expressly provided for the payment of court costs by those sentenced to state traffic school. *See*, KRS 186.574(5)(a).

Any number of statutory construction principles demonstrates the error committed by the Appellant which was properly corrected by the Jefferson Circuit Court. The fundamental principle that the specific shall prevail over the general defeats the application of the general court costs requirement set out in KRS 24A.175(3). The General Assembly, when it enacted House Bill 480, made an express provision for the payment of a fee to the county attorney and a fee to the court clerk. The fact that KRS 186.574(6)(d) is the more recent and more specific statement of the legislature when compared to KRS 24A.175 is relevant. *See*, Whiters v. University of Kentucky, 939 S.W.2d 340, 345 (Ky. 1997) ("[W]here two statutes concern the same or similar subject matter, the specific shall prevail over the general.") Troxell v. Trammel, 730 S.W.2d 525, 528 (Ky. 1987) ("[A] later statute is given affect over an earlier statute… .") The later and more specific statutory provisions contained in KRS 186.574(6) setting forth the specific monies to be paid controls over the earlier enacted and more general court costs statute set out at KRS 24A.175(3).

Further, the specific inclusion of the fees to be paid to the county attorney and court clerk supports the notion that the General Assembly intended those monies to be the only other expenses born a citizen charged with a minor traffic offense who participates in a county attorney traffic safety program. "As a general rule of statutory construction, *expressive unius est exclusio alterious* provides that enumeration of a particular thing demonstrates that the omission of another thing is an intentional exclusion." Palmer v. Commonwealth, 3 S.W3d 763, 769, (Ky. App. 1999) *citing* Louisville Water Company v. Wells, 664 S.W.2d 525 (Ky. App. 1984). The specific enumeration in House Bill 480 that monies be paid to the appropriate county attorney

and to the court clerk when a citizen participates in a county attorney traffic safety program reflects that the General Assembly intentionally and purposely intended **not** to require citizens like Mr. Higgins to also bear the burden of paying court costs on top of those fees. If the General Assembly wanted to impose court costs it could have easily said so as it has for state traffic school.

Yet another fundamental principal of statutory construction should have constrained the Appellant from imposing court costs in addition to the fees authorized by House Bill 480. This court has made absolutely clear that court costs are "part of the **punishment** imposed by the court, ...[emphasis added]." Travis v. Commonwealth, 327 S.W.3d 456, 459 (Ky. 2010). As it should, "the law never favors penalties and will not exact them unless the statute is clear and convincing." Commonwealth, *ex rel* Martin v. Tom Moore Distillery Co., 287 Ky. 125, 152 S.W. 962, 964 (Ky. App. 1935). In short, as it is undisputed that court costs are part of the **punishment** imposed in a criminal case, that form of punishment can not be imposed upon citizens like Mr. Higgins and others similarly situated unless the statute is "clear and convincing" that it intends to do so. *See,* Hause v. Commonwealth, 83 S.W.3d 1, 7 (Ky. App. 2001). House Bill 480 is clear in its intent. Further, even if there was any doubt in the construction of House Bill 480 any doubt must be resolved in favor of lenity and against the construction that would produce harsh or incongruous results. Darden v. Commonwealth, 52 S.W.3d 574 (Ky. 2001). Needless to say, the Appellant has simply failed to demonstrate that House Bill 480 clearly and convincingly also intended to impose court costs upon citizens in addition to the fees expressly authorized by House Bill 480.

As if these fundamental principles were not enough, the Commonwealth also points to the contemporaneous discussion which reflects the legislative intent of the General Assembly

when it passed House Bill 480 back in 2012. Just last year, this court looked to the contemporaneous comments made before the House and Senate Judiciary Committee when the legislature took up and considered amendments to state statutes. Stinson v. Commonwealth, 396 S.W.3d 900, 905 (Ky. 2013) (reviewing testimony "in front of both the House and Senate's Judiciary Committees, ..."). Similarly, the Appellees point to the contemporaneous comments made before the House Judiciary Committee on March 12, 2012 when the General Assembly was taking up and considering the provisions of House Bill 480. The then President of the District Judges Association was one of several persons who testified before the legislative committee, (Appendix, p. 33), and specifically stated before the House Judiciary Committee that: "I do want to point out to the committee that if you dismiss the citation rather than someone electing to go to state traffic school, the state general fund loses the court costs revenue." *See,* http://www.ket.org/legislative/archives.php?session=wgaos+13 (last visited June 3, 2013). No one questioned that assertion as it was well understood by all involved in the legislative process that the passage of House Bill 480 would prevent the imposition of court costs. The Jefferson Circuit Court correctly sought to carry out that legislative intent in its *Order* of November 15, 2013.

Furthermore, as the Commonwealth has previously noted in its *Counterstatement of the Case,* the contemporaneous comments before the House Judiciary Committee are corroborated by subsequent statements made by a co-sponsor of House Bill 480. The Statements made before the House Judiciary Committee in March, 2012 are corroborated as it was the intent of the legislature in enacting House Bill 480 "that citizens be provided an opportunity to resolve traffic citations through an appropriate educational process overseen by the county attorney so they could avoid fines, the imposition of court costs and potentially higher insurance premiums."

(Appendix, p. 23). As this court did in Stinson, it may properly consider the contemporaneous comments that were made before the House Judiciary Committee concerning the legislation's effect on the taxation of court costs. In short, everyone was on the same page when House Bill 480 was enacted. Everyone understood that citizens who successfully completed a county attorney traffic safety program and obtained a dismissal of the traffic violation would **not** have court costs imposed upon them. The Jefferson Circuit Court correctly entered its complained about *Order* on November 15, 2013 to effectuate the clear legislative intent of the General Assembly when it passed House Bill 480 in 2012.

B. APPELLANT HAS NOT PROPERLY PRESERVED THE CLAIM HOUSE BILL 480 IS UNCONSTITUTIONAL.

1. Failure to Comply with KRS 418.075.

The Appellant next goes on to claim that this Court should declare House Bill 480 unconstitutional as an impermissible "encroachment upon the judiciary in violation of the separation of powers", (*Brief for Appellant*, p. 27), and that the legislation she attacks is "unconstitutionally arbitrary." *Id.* However, the Appellant's claims on appellate review that somehow House Bill 480 is unconstitutional are not properly preserved for appellate review. This Court has repeatedly made clear that strict compliance with the mandatory notification provisions of KRS 418.075 is required. Maney v. Mary Childs Hospital, 785 S.W.2d 480, 482 (Ky. 1990). The Appellant invoked the provisions of KRS 418.075(1) and sent a letter to the Attorney General during the pendency of the original action in the Jefferson Circuit Court. The letter the Appellant sent to the Attorney General specifically provided that "[t]his notice constitutes service under KRS 418.075(1)."(Appendix, p. 59). Thereafter, the Attorney General

filed in Division 9 of the Jefferson Circuit Court its *Notice of Intention Not to Intervene.* (Appendix, pp. 60-61).

However, the Appellant has failed to comply with the mandatory provisions of KRS 418.075(2) which requires notice to the Attorney General when a case advances to the Court of Appeals or the Supreme Court. The *Notice of Appeal* the Appellant caused to be filed in the Jefferson Circuit Court is devoid of any indication that it was served on the Attorney General. (Appendix, pp. 62-63). Further, the electronic docket of the Court of Appeals reflects that no Prehearing Statement was ever filed in the Court of Appeals which would have provided notice to the Attorney General of the Appellant's constitutional attack. *See*, CR 76.03(5) (requiring service of Prehearing Statement upon the Attorney General in cases "when the constitutionality of a statute is challenged by any party in the appeal"). Similarly, there is no indication on the electronic docket of this case in the Supreme Court that the Appellant ever attempted to notify the Attorney General of the constitutional claims she now asserts in her brief on the merits.

The Appellant seemingly complied with the provisions of KRS 418.075(1) but did **not** comply with the notice requirement contained in KRS 418.075(2). The notice requirement contained in KRS 418.075 establishes a "strict rubric" which must be followed by litigants in both the trial courts and on appeal. Benet v. Commonwealth, 253 S.W.3d 528, 532 (Ky. 2008). Since the Appellant has failed to give notice to the Attorney General of her constitutional challenge in either the Court of Appeals or in the Supreme Court her claims are simply not properly preserved for appellate review. When as here, notice in conformity with KRS 418.075 is not provided on appeal the appellate court will not consider the constitutional arguments. Adventist Health System/Sunbelt Health Care Corp. v. Trude, 880 S.W.2d 539 (Ky. 1994); Massie v. Persson, 729 S.W.2d 448 (Ky. App. 1987). Appellant's constitutional argument is not

properly before this Court for review given the failure to comply with the mandatory notice requirements of KRS 418.075(2) on appeal.

2. The Constitutional Claims Are Meritless.

Even if the Appellant had properly preserved her constitutional claims by complying with KRS 418.075(2) she is simply unable to satisfy the high hurdle she faces in convincing this Court to declare the provisions of House Bill 480 unconstitutional. The legislative enactments of the General Assembly carry a presumption of constitutionality. Wynn v. Ibold, Inc., 969 S.W.2d 695 (Ky. 1998); Keith v. Hopple Plastics, 178 S.W.3d 463 (Ky. 2005). The acts of the legislature "carry a **strong** presumption of constitutionality [emphasis added]." Wynn, at 696. *See also,* Fischer v. State Board of Elections, 879 S.W.2d 475 (Ky. 1994). Commonwealth v. Halsell, 934 S.W.2d 552 (Ky. 1996) This presumption is long established in Kentucky law. Lovelace v. Commonwealth, 285 Ky. 326, 147 S.W.2d 1029 (1941); Martinez v. Commonwealth, 72 S.W.3d 581, 584 (Ky. 2002).

When the constitutionality of a statute is challenged, it is an appellate court's responsibility to "draw all reasonable inferences and implications from the act as a whole and thereby if possible sustain the validity of the act." Graham v. Mills, 694 S.W.2d 698, 401 (Ky. 1985). The burden of establishing the unconstitutionality of a statute rests squarely upon the party challenging it. Cornelison v. Commonwealth, 52 S.W.3d 570, 572 (Ky. 2001). The party who seeks to have a statute declared unconstitutional bears the burden of dispelling any conceivable basis which might justify the legislation. Roberts v. Moneyhan, 902 S.W.2d 842, 844 (Ky. App. 1995). Further, "the legislature has wide latitude and prerogative." *Id.* Moreover, "the violation of the Constitution must be clear, complete and unmistakable in order

to find the law unconstitutional." Kentucky Indus. Utility Customers Inc. v. Kentucky Utilities, Inc., 983 S.W.2d 493, 499 (Ky. 1998).

The Appellant's assertion that somehow House Bill 480 constitutes a violation of separation of powers as some sort of impermissible "encroachment on the judiciary" is meritless. Costs in criminal prosecutions were unknown at the common law and cannot be assessed unless there is statutory authority for their imposition. State v. St. Clair, 355 S.E.2d 418 (W.Va.1987); State *ex rel* Korne v. Wolke, 255 N.W.2d 446 (Wis. 1977). That has long been the law in this Commonwealth. "At common law of the defendant in a criminal action was not liable for costs," and any liability for costs "is because of legislative enactments and not others." Frazier v. Toliver, 204 Ky. 79, 263 S.W. 713 (1924).

This court should reject the Appellant's assertion that somehow House Bill 480 is so vague and ambiguous that it is impossible to determine, with a degree of certainty, what the legislature intended. First, this Court should reject her efforts to conjure up hypothetical issues as this Court decides concrete cases and not hypothetical issues. Commonwealth v. Hughes, 873 S.W.2d 828 (Ky. 1994); Veith v. City of Louisville, 355 S.W.2d 295 (Ky. 1962). Secondly, since the statute that the Appellant attacks is not concerned with criminalizing conduct or First Amendment considerations, the reviewing courts must be lenient in evaluating a claim of vagueness. Exxon Corp. v. Busbee, 644 F.2d 1030 (5th Cir. 1981). In short, in order to constitute a deprivation of due process, the statute under attack of the "so vague and indefinite as really to be no rule or standard at all." Doe v. Stables,706 F.2d 985 (6th Cir. 1983). There is nothing about the legislation contained in House Bill 480 that makes it so palently unintelligible as to be constitutionally defective. *See*, Board of Trustees of the Judicial Form Retirement System v. Attorney General, *et al*, 132 S.W.3d 770 (Ky. 2004).

In this case, the legislature clearly and unequivocally provided that county attorneys across this Commonwealth may operate county attorney traffic safety programs to resolve minor traffic offenses prior to adjudication. The legislature specifically set out that offenders alleged to have violated KRS 189A.010 or KRS 304.39-080, offenders holding a commercial drivers license under KRS 281A, or persons ineligible for state traffic school are required to be excluded from participation in a county attorney traffic safety program. *See*, KRS 186.574(6)(b). Further, the General Assembly provided for a fee to be charged to program participants and a $25.00 fee paid to the court clerk. As if that was all not enough, county attorneys are required to make a report of their activities in operating county attorney traffic safety program to the Prosecutors Advisory Council by October 1 of every year. *See*, KRS 186.574(6)(c)(2).

The Legislature set out in detail those persons who are ineligible to participate in a county attorney traffic safety program, provided that the county attorney traffic safety program shall operate prior to adjudication, specifically provided for the payment of fees to the county attorney and court clerk, and provided for a program reporting mechanism to the Prosecutors Advisory Council. The General Assembly created a mechanism to move citizens accused of minor relatively minor traffic offenses away from the formal adjudication process and into educational programs supervised by the government official charged with the enforcement of traffic violations – the county attorney. The formalization of county attorney traffic safety programs through the enactment of House Bill 480 represents the sort of broad restructuring of the goals of the criminal justice system that is rightly entrusted to the General Assembly. The General Assembly properly exercised its legislative authority to design and enact county attorney traffic safety programs as part of its legislative powers to define offenses and how they are to be ultimately resolved.

C. RCR 8.04 PROVIDES NO BASIS TO IMPOSE COURT COSTS.

The Jefferson Circuit Court correctly rejected the argument the Appellant continues to make that somehow the provisions of RCr 8.04 authorized the imposition of court costs upon citizens like Mr. Higgins who successfully complete a county attorney traffic safety program or that there is some sort of impermissible interference with the judicial function by the legislature's enactment of House Bill 480. Throughout these proceedings, the Appellant has gone to great lengths to attach significance to the word "diversion" and continues to insist that county attorney traffic safety programs constitutes a diversion program within the meaning of RCr 8.04. First, it must be observed that the term "diversion" is one of those terms that can encompass any number of sorts of dispositions prior to the entry of a judgment of conviction in a criminal case. There is no conflict or tension between the provisions of House Bill 480 and RCr 8.04. House Bill 480 created a mechanism to resolve minor traffic offenses prior to adjudication. In contrast, RCr 8.04 concerns itself with the diversion of misdemeanor offenses.

First of all, county attorney traffic safety programs authorized by House Bill 480 simply do not fall within the scope of RCr 8.04. This Court in Flynt v. Commonwealth, 105 S.W.3d 415, 418 fn. 10 (Ky. 2003) explained that the provisions of RCr 8.04 are simply the authorization by this Court for the pretrial diversion of misdemeanants as provided for in KRS 533.262(2). That statute provides in relevant part that "the only other pretrial diversion program utilized by the Commonwealth should be those authorized by the Kentucky Supreme Court and providing for the pretrial diversion of misdemeanants."

This Court in Flynt explained that the statutory provisions "permit programs that are 'authorized by the Kentucky Supreme Court and providing for the pretrial diversion misdemeanants,' KRS 533.262(2), e.g., those implemented in district court pursuant to CR 8.04 (sic)." *Id.* Simply put, RCr 8.04 is intended for the pretrial diversion of misdemeanants in the District Court. Flynt makes clear that RCr 8.04 is for the diversion of misdemeanant offenders. The rule is of no applicability to the resolution of traffic offenses pursuant to a county attorney traffic safety program as subsequently authorized by the General Assembly in its enactment of KRS 186.574(6).

The clear and unequivocal intent of the General Assembly in enacting KRS 186.574(6) was to permit citizens like Mr. Higgins to resolve relatively minor traffic offenses in an efficient manner **prior to adjudication**. The General Assembly's enactment of the House Bill 480 was simply the exercise of its inherent authority since "[i]t is the legislature which defines the parameters of justice by enacting statutes that govern the criminal justice process." K.R. v. Commonwealth, 360 S.W.3d 179, 189 (Ky. 2012). The Appellant's insistence that RCr 8.04 applies to citizens opting to participate in a county attorney traffic safety program is completely contrary to House Bill 480's efforts to resolve minor traffic offenses in an efficient manner prior to adjudication. In contrast, the diversion scheme set out in RCr 8.04 specifically mandates court supervision and approval. The diversion scheme set out in RCr 8.04 may be imposed for the period of probation for a misdemeanor crime. *See*, RCr 8.04(2). RCr 8.04 also mandates the filing of a written agreement with the court setting forth the terms and conditions of any such agreement. *See*, RCr 8.04(3). Additionally, the rule governing misdemeanor offense diversion provides for the release from custody on the charges for which diversion is granted, which is obviously of no applicability with the sort of minor traffic infraction of which Mr. Higgins was

cited. *Id.* As this Court explained in Flynt, the General Assembly looked to this Court to develop rules for the pretrial diversion of those offenders charged with misdemeanor offenses in the District Court. That is precisely what RCr 8.04 has done. With its passage of House Bill 480, the General Assembly exercised its legislative prerogative for the resolution of minor traffic offenses through the operation of county attorney traffic safety programs. Appellant's effort to impose the requirements of RCr 8.04 upon the resolution of minor traffic offenses prior to adjudication manifestly defeats the intention of the General Assembly when it passed House Bill 480.

Try as she might, the Appellant simply cannot turn a county attorney traffic safety program for minor traffic violations into a misdemeanor pretrial diversion program falling within the scope of RCr 8.04. Further, the Appellant goes on to argue that since diversion agreements "may include conditions that could be imposed upon probation", RCr 8.04(2), she is entirely free to impose court costs upon citizens like Mr. Higgins who successfully complete a county attorney traffic safety program. She is wrong. It bears repeating that the first sentence of RCr 8.04(2) provides that **"[t]he agreement** may include conditions that could be imposed upon probation [emphasis added]." The operative word here is "**the agreement**". When offenders enter into a diversion program where they agree to be bound by conditions that could be imposed if they were on probation, they have expressly given their consent to pay court costs notwithstanding a lack of a conviction required by KRS 24A.175(3). The law, as it should, rightly recognizes that any statute that "inures to the benefit of a defendant"... "like any other constitutional or statutory right, can be the subject of a valid waiver." Commonwealth v Townsend, 875 S.W.3d 12, 15 (Ky. 2002). In this case, Mr. Higgins has never given his consent to the payment of court costs in addition to the fees authorized by KRS 186.574(6). The

Appellant is not free to take the agreement requirement of RCr 8.04(2) and somehow transform it into a judicial mandate to impose court costs upon citizens who opt to participate in a county attorney traffic safety program. That certain offenders in the District Court who are charged with misdemeanor offenses may agree to conditions that could be imposed upon probation hardly stands for the proposition that the Appellant is authorized to impose court costs upon citizens like Mr. Higgins absent an express agreement. The Appellant's application of RCr 8.04 to citizens like Mr. Higgins is not only contrary to law, but is fundamentally unfair, as those citizens have **not** agreed to the imposition of such conditions upon their participation in a county attorney traffic safety program.

D. THE REFUSAL TO DISMISS THE UNIFORM CITATION VIOLATES FUNDAMENTAL PRINCIPLES OF GOVERNMENTAL SEPARATION OF POWERS.

The Jefferson Circuit Court correctly prohibited the Appellant from conditioning the dismissal of the traffic citation issued against Mr. Higgins conditioned upon the payment of court costs. As set forth earlier herein, the imposition of court costs upon citizens like Mr. Higgins who successfully complete a county attorney traffic safety program is simply not authorized by Kentucky law. Once Mr. Higgins successfully completed the county attorney traffic safety program, the Jefferson County Attorney properly sought dismissal of the *Uniform Citation* subject to the authority of RCr 9.64. The exercise of the judicial authority to dismiss a case pursuant to RCr 9.64 is subject to the standards set out by this Court in Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004).

The Appellant first claims that somehow the Appellees should have filed a cross-appeal from the *Order* of the Jefferson Circuit Court which granted the writ of prohibition. She is

wrong. The general rule is that a party **cannot** appeal from a judgment in its favor. Miller v. Miller, 335 S.W.2d 884, 886 (Ky. 1960); Brown v. Barkley, 628 S.W.2d 616, 618 (Ky. 1982). The Appellees won in the Jefferson Circuit Court. The Appellees simply were not aggrieved by the judgment of the Jefferson Circuit Court. The Jefferson Circuit Court merely observed that District Court should grant or deny a motion to dismiss pursuant to RCr 9.64 based upon "a fair consideration of all relevant concerns". (Appendix, p. 4). That consideration of all the appropriate factors and concerns where the prosecution seeks dismissal of a pending criminal case is necessarily controlled by the legal standards set out by this Court in Hoskins v. Maricle, 150 S.W.3d 1 (Ky. 2004). The Appellees were not required to file a cross-appeal in this case on the issue of dismissal as the Appellees were in no manner aggrieved by the underlying judgment of the Jefferson Circuit Court.

It is fundamental that the authority to prosecute actions enforcing the laws of this Commonwealth is a power uniquely inherent to the executive branch of government. In this case, and other minor traffic cases like it, the duly appointed representative of the Commonwealth – the Jefferson County Attorney – made the decision not to go forward with the case for a formal adjudication once Mr. Higgins successfully completed the county attorney traffic safety program. Of course, as has been discussed earlier herein, this sort of resolution of relatively minor traffic offenses prior to adjudication has been expressly approved by the General Assembly with its enactment of House Bill 480 in 2012. In the case against Mr. Higgins and others like it the Appellant has violated basic principles of separation of powers when she declined to grant the *Commonwealth's Motion to Dismiss Uniform Citation* charging a minor traffic offense. "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings or

what precise charge shall be made, or whether to dismiss a proceeding once brought." Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

Of course, the executive branch is responsible for the enforcement of the laws of the Commonwealth. *See*, Kentucky Constitution Section 81. It is "the duty of the executive department to enforce criminal laws." Bradshaw v. Bell, 487 S.W.2d 294, 299 (Ky. 1972). Section 27 of the Kentucky Constitution specifically provides for three branches of state government: legislative, executive and judicial branches. Further, Section 28 of the Kentucky Constitution ensures that each branch retains its own sphere of authority free from undue encroachment from the other branch. Additionally, Kentucky has strictly adhered to the separation of powers doctrine set forth in the state constitution. Legislative Research Commission v. Brown, 664 S.W.2d 907, 912 (Ky. 1984).

In recognition of the broad latitude the executive branch possesses as to when and how it will enforce the laws of this Commonwealth, prosecutors possess broad discretion to terminate cases they have commenced to enforce the laws. As shall be explained, the Jefferson District Court was required to grant the Commonwealth's motion to dismiss the *Uniform Citation* against Mr. Higgins as the Commonwealth's requested dismissal was not "clearly contrary to manifest public interest." As a general matter, the authority to dismiss pending prosecutions in this Commonwealth is set out in RCr 9.64. That rule of the Kentucky Rules of Criminal Procedure provides in relevant part that "[t]he attorney for the Commonwealth, **with the permission of the court**, may dismiss the indictment, information, complaint or uniform citation prior to the swearing of the jury or, in a non-jury case, prior to the swearing of the first witness [emphasis added]." What must be pointed out is that the phrase contained in RCr 9.64 that dismissal may be granted "with the permission of the court", does **not** mean that somehow the executive's

broad discretion to determine whether a pending prosecution should continue or be terminated has somehow been shifted or turned over to the judicial branch.

This Court has explained in no uncertain terms that a motion to dismiss a pending prosecution "**must be sustained** unless clearly contrary to manifests public interest [emphasis added]." Hoskins v. Maricle, 150 S.W.3d 1, 24 (Ky. 2004). This Court adopted this standard concerning an "independent" motion by a prosecutor to dismiss a charging instrument relying upon the decision of the United States Court of Appeals for the Fifth Circuit in United States v. Cowan, 524 F.2d 504 (5th Cir. 1975). As this Court explained, the federal authority which it adopted as the law of this Commonwealth establishes "sound and reasonable guidelines. Thus, we adopt these principles for Kentucky." Hoskins v. Maricle, at 24.

The United States Court of Appeals for the Fifth Circuit in Cowan explained that the analogous "leave of court" language contained in Rule 48 of the Federal Rules of Criminal Procedure was simply intended to erect "a check on the abuse of executive prerogatives." Cowan, at 513. The Fifth Circuit explained that such an approach was not "intended to confer on the Judiciary the power and authority to usurp and interfere with the good faith exercise of the executive power to take care that the laws are faithfully executed." As the Fifth Circuit went on to explain, "[t]he executive remains the absolute judge of whether a prosecution should be initiated and the first presumptively best judge of whether a pending prosecution should be terminated. The exercise of its discretion with respect to the termination of pending prosecution should not be judicially disturbed unless clearly contrary to manifest public interest." Cowan, at 513. It bears repeating that these fundamental principles are the law of this Commonwealth since this very Court adopted these principles as "sound and reasonable guidelines" in its decision in Hoskins v. Maricle.

The law could hardly be any clearer in this Commonwealth. As a general matter, the Jefferson County Attorney, as the Commonwealth's representative in the Jefferson District Court, is the presumptively best judge of whether a pending traffic offense proceeding like the one against Mr. Higgins should be terminated. The duly elected prosecutor in this case, the Jefferson County Attorney, is entitled to exercise his discretion to seek the termination of the case against Mr. Higgins for a relatively minor traffic offense and other minor traffic cases like it once a citizen has successfully completed a county attorney traffic safety program as authorized by House Bill 480.

Further, as has been set out earlier herein, the General Assembly in its passage of House Bill 480 specifically intended that citizens who commit relatively minor traffic offenses have the opportunity to resolve those minor traffic offenses **prior to adjudication**. The Jefferson District Court was simply without authority to disturb the exercise of the executive branch's prosecutorial discretion to terminate the proceeding against Mr. Higgins since there had been absolutely no showing that the requested dismissal was somehow "clearly contrary to manifest public interest." In this case, the Appellant infringed upon the executive branch's authority to terminate the proceeding against Mr. Higgins when it conditioned dismissal on the imposition of unauthorized court costs. Expressed somewhat differently, the attempt by the Appellant to impose unauthorized court costs did not establish grounds to deny the Commonwealth's motion to dismiss.

It should be patently obvious that the Commonwealth's motion, made through the Jefferson County Attorney, to terminate the proceeding against Mr. Higgins and other relatively minor traffic offenses like it is not "clearly contrary to manifest public interest." Motions to dismiss like the one in this case should be refused only in the "rarest" of cases. In re Richards,

213 F.3d 773, 786 (3rd Cir. 2000). The General Assembly of this Commonwealth has specifically vested county attorneys across the state with the statutory authority to operate traffic safety programs to resolve minor traffic offenses prior to the formal adjudication of the traffic offense citations in the District Court. The complained about action by the Appellant refusing to dismiss the traffic citation thwarts the proper exercise of executive branch power absent a finding of the sort required by Hoskins v. Maricle.

Mr. Higgins and other citizens like him who successfully complete the Jefferson County Attorney's traffic safety program are entitled to enjoy the obvious benefits that the General Assembly intended to flow from such programs. The Commonwealth's *Motion to Dismiss Uniform Citation* after the completion of the statutorily authorized traffic safety program was manifestly **not** "clearly contrary to the manifest public interest." The Appellant improperly infringed upon the Commonwealth's exercise of its prosecutorial discretion, exercised in conformity with House Bill 480, by failing to articulate what manifest public interest would be violated by a dismissal.

The Commonwealth wants to dismiss the *Uniform Citation* and that is what Mr. Higgins understandably wants as well. What is clearly contrary to the manifest public interest in this case is the attempt to impose court costs upon citizens despite the clear and obvious legislative intention to the contrary. The Jefferson Circuit Court correctly directed the Appellant to "dismiss the citations of Drive Safe Louisville participants upon successful completion of the program and motion of the Jefferson County Attorney's Office, without the payment of court costs, unless there exists articulable reasons for denial". (Appendix, p. 4) Of course, any "articulable reasons for denial" must comport with the controlling legal standard as set out by this Court in Hoskins v. Maricle.

E. THE IMPOSITION OF COURT COSTS WAS AN IMPERMISSIBLE RULE.

The imposition of court costs upon Mr. Higgins, and other citizens similarly situated, by the Appellant was an impermissible rule of court seemingly applied only in the division of the Jefferson District Court in which she sits. Whether it is called a practice, policy, or custom the practical effect of the Appellant imposing court costs is, at its essence, a court rule which is not limited to a single case. The Appellant has declined to dismiss numerous traffic citations at the request of the Commonwealth after successful completion of the Jefferson County Attorney's traffic safety program because court costs have not been paid. The Jefferson County Attorney identified at least one hundred occasions over several months in which the Appellant declined to terminate the traffic offense proceeding after successful completion of the traffic safety program because court costs had not been paid by the citizen when it commenced the original action in the Jefferson Circuit Court.

This argument is controlled by the decisions of this Court in Abernathy v. Nicholson, 899 S.W.2d 85, 86 (Ky. 1995) and the more recent decision of the Court of Appeals in Delahanty v. Commonwealth *ex rel.* Maze, 295 S.W.3d 136 (Ky.App. 2009). In Abernathy, a sole judge of the Jefferson District Court entered "an administrative order which prohibited persons with an outstanding arrest warrant or bench warrant from appearing before him until all previously ordered contempt fines had been paid, or if there were none, until an appearance bond in the sum of $50.00 had been posted for each case, or until a judge ordered a case re-docketed." Abernathy, *supra*. In Delahanty the Commonwealth *ex rel.* Maze, 295 S.W.3d 136 (Ky.App.

2009) a sole judge of the Jefferson District Court announced a policy prohibiting the Jefferson County Attorney and his assistants from making objections to defense counsel's questions during preliminary hearings to establish probable cause.

The complained about practice, policy or custom of the Appellant falls squarely within the scope of both the Abernathy and Maze decisions. As this Court observed in Abernathy, *supra.*, "[w]hatever its appellation, the "order" is a rule. It is not limited to a particular case, but applies to all cases which fall within its confines." Abernathy, at 87. Similarly, the Court of Appeals in Maze agreed with the Jefferson County Attorney's assertion that the policy of practice of the sole judge in that case was a "rule" since the complained about practice was "not limited to a particular case; it is prospective by its terms, and is indefinite in nature." Maze, at 143 *quoting* Abernathy, 899 S.W.2d at 87.

Whether it is called a policy, practice, ruling or custom the complained about action of the Appellant constitutes a rule within the meaning of Abernathy and Delahanty. The complained about action is clearly not limited to just the case involving Mr. Higgins as evidenced by the repeated instances in which the Appellant has declined to dismiss a *Uniform Citation* alleging a minor traffic offense once a citizen has successfully completed the county attorney traffic safety program. Further, given the Appellant's conclusion that Kentucky law authorizes the imposition of court costs on citizens like Mr. Higgins the complained about action or practice is "prospective by its terms." Finally, the complained about practice is clearly "indefinite in nature" for at least as long as the Appellant continues to preside over traffic offense proceedings in the Jefferson District Court.

Just as the complained about "rules" in Abernathy and Maze were contrary to Kentucky law, so it is in this case. In both of those cases the reviewing courts found that the complained

about actions of a single Jefferson District Court Judge violated Section 116 of the Kentucky Constitution and SCr 1.040(3)(a). In both of those cases the complained about practices by single judges of the Jefferson District Court were struck down as unauthorized "rules" since the authority to proscribe rules of practice and procedures is vested exclusively in the Supreme Court of Kentucky. The Supreme Court of Kentucky permits local rules to be promulgated subject to its oversight and approval pursuant to Section 116 of the Kentucky Constitution and SCR 1.040(3)(a). Of course, "local rules cannot contradict any substantive rule of law or any rule of practice and procedure promulgated by the Supreme Court..." Maze, at 473 *citing* Abernathy, at 87. In this case, the complained about action by the Appellant imposing costs constitutes an impermissible rule which contradicts "any substantive rule of law." The "substantive rule of law" violated by the complained about rule in this case affecting Mr. Higgins and other citizens like him is the law of Kentucky governing the imposition of court costs in the District Court and the express provisions of KRS 186.574(6)(a)-(d).

F. JUDICIAL ESTOPPEL DOES NOT AUTHORIZE THE IMPOSITION OF COURT COSTS.

In at least partial support in its decision to impose costs upon Mr. Higgins and other citizens similarly situated, the Appellant also looked to other cases in which court costs were imposed. The Appellant continues to assert that somehow Mr. Higgins and other citizens like him ought to be required to pay court costs because court costs were imposed in other cases before the Jefferson District Court in cases which did not fall within the scope of the county attorney's traffic safety program. Of course, any agreement by a defendant to pay court costs in other types of cases does **not** provide a basis to impose court costs upon Mr. Higgins or other citizens who successfully complete a county attorney traffic safety program pursuant to KRS

186.574(6)(a)-(d). As noted earlier herein, defendants are free to waive any statutory provision that inures to their benefit. Commonwealth v. Townsend, 87 S.W.3d 12, 15 (Ky. 2002).

As has been noted earlier herein, the taxation of court costs upon a defendant is purely statutory in nature. As this Court has observed, "our longstanding rule is that defendants may generally waive statutory rights." Padgett v. Commonwealth, 312 S.W.3d 336, 348 (Ky. 2010). Defendants in the Jefferson District Court waive important constitutional rights every day and the law rightly recognizes that defendants may likewise waive statutory rights as well. Just as a defendant can waive any number of significant constitutional rights so can a defendant waive the statutory provision which limits the imposition of court costs upon him only upon the existence of a conviction in a case. Further, just as a defendant is deemed to have "waived her right to object to fines" that were not authorized by law "because her trial counsel asserted to the circuit court that fines were appropriate." Carver v. Commonwealth, 328 S.W.3d 206, 214 (Ky.App. 2010), so may any objection to the payment of court costs be waived.

While the Appellant does not specifically talk about notions of judicial estoppel, that is essentially the doctrine she continues to invoke when she relies on the idea that the Commonwealth's position in other cases somehow mandated or required that costs be imposed upon Mr. Higgins in this case. The doctrine of judicial estoppel provides absolutely no basis to impose court costs upon Mr. Higgins or other citizens like him. *See,* New Hampshire v. Maine, 532 U.S. 742, 750-751, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (discussing the doctrine). As regards the application of the equitable doctrine of judicial estoppel in criminal cases, "we are aware of no cases which the doctrine has successfully invoked against the government." Smith v. State, 765 N.E.2d 578, 583 (Ind. 2002). Judicial estoppel is an "obscure doctrine" which has never been applied against the government in a criminal proceeding. United States v. Kattar, 840

F.2d 118, 129, 130, fn. 7 (1st Cir. 1988); Nichols v. Scott, 69 F.3d 1255, 1272 (5th Cir. 1995). That some defendants may have waived their rights to complain about the imposition and payment of court costs hardly stands for the proposition that the Appellant could unilaterally impose court costs upon Mr. Higgins and other citizens like him who most assuredly do not agree to do so.

G. RELIEF WAS CORRECTLY GRANTED.

The Jefferson Circuit Court correctly granted the relief sought. Extraordinary writs of the sort sought in this case may be granted in two classes of cases. The first class requires a showing that "the lower court is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court." Hoskins v. Maricle, 150 S.W.3d 1, 10 (Ky. 2004). The second class requires a showing that "the lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise," and it usually requires a showing that "great injustice and irreparable injury will result if the petition is not granted." *Id.* More recently, this Court reiterated the standards for granting relief when an original action is commenced, Toyota Motor Mfg., Kentucky, Inc. v. Johnson, 323 S.W.3d 646, 649 (Ky. 2010):

> We recognize two broad classes of cases in which a writ may be properly granted. The first is when a lower court "is proceeding or is about to proceed outside of its jurisdiction and there is no remedy through an application to an intermediate court...." The second is when a "lower court is acting or is about to act erroneously, although within its jurisdiction, and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition [for a writ] is not granted." Under a special subclass of the second class of writ cases, a writ may issue even absent irreparable injury to the writ-petitioner if the lower court is acting erroneously and a supervisory court believes that "if it fails to act the administration of justice generally will suffer the great and irreparable injury."

This case is properly characterized as falling within the second class of cases in which extraordinary relief is available. This is so because in the context of extraordinary writs, "jurisdiction" refers not to mere legal errors but to subject matter jurisdiction. Goldstein v. Feeley, 299 S.W.3d 549 (Ky. 2009). In the context of original action seeking extraordinary relief the word "jurisdiction" "means jurisdiction of the subject matter." Manning v. Baxter, 281 Ky. 659, 136 S.W.2d 1074, 1075 (1940). *See also,* Petrey v. Cain, 987 S.W.2d 786 (Ky. 1999).

The Appellees were entitled to the relief sought on the basis that the Appellant "is acting or is about to act erroneously" within her jurisdiction and there exists no adequate remedy by appeal or otherwise and great and irreparable injury will result if relief is not granted. As Appellees have demonstrated there can be little doubt that the named Appellant "is acting or is about to act erroneously." As set out in detail herein, the complained of decision to impose court costs in addition to the fees authorized by House Bill 480 upon Mr. Higgins and other citizens like him is erroneous for any number of reasons as it offends multiple provisions of Kentucky law.

As the petitioners have demonstrated, the taxation of costs upon Mr. Higgins and other citizens like him is simply not authorized by law as the cost statute requires a conviction. Further, the complained about decision of the Jefferson District Court imposing court costs is contrary to the provisions of KRS 186.574(6)(d) which makes citizens responsible for paying the fee to the county attorney and a $25.00 fee to the court clerk and not court costs plus the traffic safety program fees. Additionally, the complained about decision was erroneous because it infringed upon the authority of the Executive Branch to terminate proceedings in its sound discretion which may be overridden by the judicial branch only if that discretion has been so

grossly abused that it results in a termination that is nothing short of being contrary to manifest public policy.

Next, the Commonwealth observes that no adequate remedy by appeal exists for it when error like the one in this case is committed during the pendency of a proceeding in the District Court. Unlike the Commonwealth in cases before the Circuit Court, the Commonwealth does **not** enjoy the right to an interlocutory appeal from the District Court. KRS 22A.010(4) grants the Commonwealth a right to appeal from interlocutory orders only from the Circuit Court. In contrast, the statutory scheme allows only for appeal to the Circuit Court "from any final action of the District Court." KRS 23A.080(1). *See,* Ballard v. Commonwealth, 320 S.W.3d 69 (Ky. 2010). Since the Commonwealth does not enjoy an interlocutory appeal from the District Court, it has been recognized that original actions may be properly invoked by the Commonwealth to obtain appropriate review of interlocutory decisions of the District Court. Tipton v. Commonwealth, 770 S.W.2d 239, 241 (Ky.App. 1989); Commonwealth v. Williams, 995 S.W.2d 400, 402 (Ky.App. 1999).

The Appellees are also able to satisfy requirement of irreparable injury in the absence of the relief sought in the Jefferson Circuit Court. The refusal to terminate the proceeding against Mr. Higgins and other traffic cases like it unless court costs are paid fundamentally interferes with the executive function. The Commonwealth is entitled to terminate the traffic offense proceeding against Mr. Higgins and other citizens like him and that the decision to do so is subject to judicial authority only to the extent the executive has so grossly abused its discretion that the requested dismissal is contrary to manifest public interest.

The Appellant refused to terminate the proceedings in the Jefferson District until court costs not authorized by law have been paid. Needless to say, the payment of court costs is no

reason to refuse to dismiss the case since such costs are not authorized by law. The complained about decision refusing to terminate the proceeding against Mr. Higgins and others like him effectively means that the Appellant is exercising an executive branch function. Respondent is not free to refuse to dismiss the traffic citation because unauthorized court costs have not been paid. The complained about decision by the Appellant upended the executive authority rightly exercised by the County Attorney to terminate proceedings as a matter of fundamental separation of powers principles **and** as intended by the General Assembly with its passage of House Bill 480.

Further, even if the refusal to terminate the proceeding against Mr. Higgins and others like him did not constitute irreparable injury to the executive's inherent executive authority, it must be remembered that the "irreparable injury" requirement is not absolute. A court may properly grant relief if a lower court is proceeding erroneously and correction of the error is necessary and appropriate in the interest of orderly judicial administration. "Under a special subclass of the second class of writ cases, a writ may issue even absent of irreparable injury to the writ–petitioner if the lower court is acting erroneously and a supervisory court believes that 'if it fails to act the administration of justice generally will suffer the great and irreparable injury.'" Toyota Motor Mfg., at 649. "In those special cases involving the interest of the orderly administration of justice, the requirement that the petitioner must prove great injustice and irreparable harm is waived." K.N. v. Commonwealth, 375 S.W.3d 816 818 (Ky. 2012) *citing* Grange Mut. Ins. Co. v. Trude, 151 S.W.3d 803, 810 (Ky. 2004).

In this special subclass of the second class of writ cases, the court to which application is made for the relief is recognizing that if it fails to act the administration of justice will suffer the great and irreparable injury. Bender v. Eaton, 343 S.W.2d 799, 801 (Ky. 1961); Commonwealth

v. Green, 194 S.W.3d 277, 281 (Ky. 2006). This exception has been applied "where the action for which the writ is sought would blatantly violate the law, ..." Independent Order of Foresters v. Chauvin, 175 S.W.3d 610, 617 (Ky. 2005). Such a violation of the law has occurred in this case.

If ever "the interest of orderly and judicial administration" prong of the analysis fit a case, surely this case is it. The Appellant's insistence on imposing court costs as a condition before a traffic case will be terminated at the request of the Commonwealth applies only to her division of all the various divisions of the Jefferson District Court. The imposition of court costs is contrary to the controlling court costs statute **and** the express intent of the General Assembly when it enacted House Bill 480 authorizing county attorneys in this Commonwealth to operate traffic safety programs. Mr. Higgins and other citizens like him are entitled to enjoy the full benefit of what the General Assembly intended when it passed House Bill 480. The interest of orderly judicial administration was served by the grant of the relief by the Jefferson Circuit Court so that all the citizens of Jefferson County could properly enjoy the benefits of a traffic safety program without the imposition of unauthorized court costs. The complained about *Order* of the Jefferson Circuit Court should be **affirmed**.

CONCLUSION

For the reasons set forth above, the Appellees respectfully request that the *Order* of the Jefferson Circuit Court of November 15, 2013 be **affirmed.**

Respectfully submitted,

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APPENDIX

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